
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 13, 1991
CASE NO. 89-ERA-6

IN THE MATTER OF

FREDERICK E. MCCUISTION,
COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Before me for review is a Recommended Decision and Order (R.D. and O.) issued on February 1, 1990, by Administrative Law Judge (ALJ) Clement J. Kichuk. After conducting a seven-day administrative hearing, the ALJ determined that Complainant had been subjected to employment discrimination because of his statutorily-protected activities and that any legitimate reasons proffered by Respondent for its actions were pretextual. Upon review of the case record in its entirety, I agree. Unless otherwise stated, I adopt the ALJ's findings generally, and rely specifically on those referenced below.[1] Because the ALJ has recounted and weighed the evidence thoroughly, I engage in a summary analysis with reference to the particular findings in the R.D. and O. on which I rely.

FACTS

At the time of his termination, Complainant Frederick E. McCuistion had been employed by Respondent Tennessee Valley Authority (TVA) for fifteen years. Complainant's work history was exemplary. R.D. and O. at 3-4, 35-36 (carryover

paragraph (par.)), 48-49 (carryover par.). Following successive promotions through the engineering ranks, Complainant achieved the

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management position of instrumentation quality control unit supervisor in may 1986. Complainant and the inspectors that he supervised engaged in competent and aggressive quality control. Complainant's inspectors frequently reported problems to Respondent's Employee Concerns Program (ECP) and to the Nuclear Regulatory Commission (NRC). Complainant supported his inspectors in these activities. Respondent knew about the inspector reports. *See* R.D. and O. at 11 (first full par.), 48 (fourth par.).

On the evening of September 2, 1987, Complainant received a telephone call at his residence requesting that he provide an inspector to inspect work proposed for the diesel generator building at Respondent's Watts Bar Nuclear Plant. *See* R.D. and O. at 4-6. That location was being prepared for display "as a model of quality and safety to [Respondent's] highest ranking nuclear officials on their inspection visit scheduled for the following morning."[2] R.D. and 0. at 43. Unable to send an inspector, Complainant traveled to the plant to perform the inspection. upon reviewing the proposal, Complainant determined that the work involved was prohibited under an earlier Stop Work Order (SWO). Complainant's determination was overridden by Hoyt Johnson, Respondent's Site Quality Assurance Manager,[3] and the work was performed that evening. R.D. and O. at 5. On September 3, Complainant contacted two of his inspectors and Roy Anderson, his immediate supervisor. He directed the inspectors to check the work and write a Condition Adverse to Quality Report (CAQR) if the SWO had been violated. R.D. and O. at 6. The inspectors also found a violation. Inspector Willoughby, whom Complainant ultimately assigned to write the CAQR, encountered management resistance. When presented with the CAQR, Leonard Peterson, manager of the quality control section, refused signature, stating that "my name is not going to go across Admiral White's desk twice in the same week."[4] R. D. and O. at 7.

Peterson also had communicated to Anderson that he "was upset and was going to 'run [Complainant] off' because of the problems his people were causing in writing the CAQR." R.D. and O. at 11, 46 (second full par.). Peterson directed Anderson to prepare a disciplinary letter citing Complainant for abuse of annual leave. When Anderson objected that Complainant had used minimal leave and that all of his leave had been approved,

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Peterson directed that Complainant be cited, instead, for "creating a crisis." R.D. and O. at 11. Complainant received the letter, dated September 4, 1987, on October 5. After discussion, the letter was withdrawn. R.D. and O. at 11-12, 14, 47 (subpart (3)).

In October and November 1987, Peterson participated in rating Complainant "unsatisfactory" for purposes of his annual Management Appraisal Summary (MAS). Anderson, Complainant's immediate supervisor, sharply disagreed with the unsatisfactory rating. R.D. and O. at 17, 21, 49.

> Mr. Peterson's justification for giving [Complainant] an unsatisfactory rating was "how easy people make it for us" . . . .
> Mr. Peterson said [Complainant] had not made it easy for him. Mr. Johnson had said . . . that they were going to make MAS reviews measurable, such as for people that go to the NRC and ECP.

R.D. and O. at 21.

Thereafter, Complainant attempted unsuccessfully to transfer to another position. In January 1988, Anderson retired prematurely due to Respondent's harassment and intimidation. R.D. and O. at 24. In February 1988, Johnson suggested that Complainant seek employment outside TVA. *Id*. Peterson recommended the elimination of Complainant's management level in the spring of 1988. *Id*. During that summer, Respondent instituted a reorganization and reduction in force (RIF). Complainant's management level was eliminated. By memorandum dated July 25, 1988, Respondent notified Complainant that he would be terminated effective August 25, 1988. Complainant filed a discrimination complaint under the ERA on August 19, 1988. With the exception of another employee who chose to leave TVA, Complainant was the only employee within his management level who was not retained in some capacity. R.D. and O. at 25-26, 49-50 (subpart (5)).

ANALYSIS

1. The Merits

Under the burdens of proof and production in "whistleblower" proceedings, Complainant first must make a prima facie showing

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that protected activity motivated Respondent's decision to take adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant then must establish that the reason proffered by Respondent is not the true reason. Complainant may persuade directly by showing that the unlawful reason more likely motivated Respondent or indirectly by showing that Respondent's proffered explanation is unworthy of credence. *Dartey v. Zack Co.*, Case No. 80-ERA-2, Sec. Dec., Apr. 25, 1983. *Cf. Roadway Exp., Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987).

In order to establish a prima facie case, Complainant must show that he engaged in protected activity, that he was subjected to adverse action, and that Respondent was aware of the protected activity when it took the adverse action. Complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.[5] Under the ERA, an employee is protected if he

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter . . . ; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter . . . .

42 U.S.C. § 5851(a).

Complainant made a prima facie showing of retaliatory conduct by Respondent. First, the record shows that Complainant engaged in several protected activities. A complaint or charge concerning quality or safety communicated to management or the NRC is protected under the ERA. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University-Nuclear Systems. Inc.*, 735 F.2d 1162-1163; 10 C.F.R. Part 50 and Appendix B (1990). Thus, Complainant was protected in determining that the work in the diesel generator building violated a SWO, in his direction that a CAQR be issued, and in his participation in its issuance. Complainant also was protected in reporting the removal of

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required clamps to management and the NRC, R.D. and O. at 11 (first full par.), 34 (first full par.), and in meeting with Johnson regarding Willoughby's concerns about the "timeliness" CAQR. R.D. and O. at 10 (second full continuation par.).

A complaint or charge of employer retaliation because of safety and quality control activities also is protected. The ERA requires that employers refrain from unlawfully motivated employment discrimination, and a complaint that an employer has violated this requirement may "commence . . . a proceeding for the administration or enforcement of [the) requirement" or may constitute participation "in any other action to carry out the purposes of this chapter . . . . 42 U.S.C. § 5851(a)(1) and (3). Here, in late 1987, Complainant complained to the NRC and to TVA Board Chairman Dean about Respondent's retaliation, i.e., the disciplinary letter and unsatisfactory MAS. These complaints precipitated investigation by the Office of Inspector General (OIG). R.D. and O. at 22-23.

Second, it is undisputed that Complainant was subjected to a series of adverse actions in this case. Complainant's RIF and Respondent's failure to retain him in another capacity amounted to discharge. As the result of the unsatisfactory MAS, Complainant was denied

a percentage pay increase. R.D. and O. at 22. Although the disciplinary letter was not retained in Complainant's personnel record, it formed a substantial basis for the MAS rating. R.D. and O. at 12, 47. It also constituted "discrimination" in that other supervisors were not cited for commonplace procedure revisions -- the core of its "creating a crisis" allegation. R.D. and O. at 15. *See English v. Whitfield*, 858 F.2d 957, 963-964 (4th Cir. 1988) (retaliatory harassment claims cognizable under ERA).

Finally, causation is shown. The disciplinary letter closely followed the SWO incident, and Complainant received his unsatisfactory MAS as he and his inspectors pursued the protracted CAQR resolution. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v. Baldrige*, 759 F.2d 80, 86 and n.6 (D.C. Cir. 1985)*; Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982) (causal connection established by showing that employer was aware of protected activity and that adverse action followed closely thereafter). Managers Peterson and Johnson articulated intentions to "run [Complainant] off" and to appraise job performance in terms of NRC and ECP involvement. R.D. and O. at 11, 21, 46, 48. The ALJ also cited evidence of discriminatory animus on the part of Respondent against employees who engaged

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in protected activity. R.D. and O. at 38-39 (Messrs. Moore and Huddleston). The record supports a finding to this effect, which I adopt.

Respondent argues that, because the problems in issuing a CAQR merely were commencing in early September 1987, Complainant is mistaken in his account that, on September 3, Anderson stated that Peterson "was upset and was going to 'run [Complainant] off' because of the problems his people were causing in writing the CAQR." Resp. Opposition Br. at 26-28. It appears plausible however, that Anderson would reference Peterson's anger about a possible CAQR since its issuance comprised the subject of discussion between Anderson and Complainant. Moreover, Inspectors Willoughby and Huddleston complied with Complainant's request that they investigate immediately upon speaking to Complainant early on September 3. Peterson thus faced the prospect of being reported for a violation in a model area of the plant closely following its inspection and anticipated approval by top management.

Even assuming that neither Peterson nor Anderson specifically mentioned a CAQR as early as September 3, I find it quite likely that Anderson told Complainant of Peterson's displeasure over the SWO incident on that date. Peterson raised the issuance of a disciplinary letter immediately thereafter. First, he directed that it cite Complainant for abuse of leave. When advised that the allegation was groundless, he substituted the "creating a crisis" rationale. While Anderson succeeded initially in deflecting the letter, it surfaced 30 days later when presented to Complainant on October 5. By then, the CAQR dissension was well underway.[6] "At the time [Complainant] received the [disciplinary] letter, he did not know what the letter referred to." R.D. and O. at 11. This fact suggests

that the "creating a crisis" allegation stemming from the panel procedure incident of September 1 or 2, R.D. and O. at 13, had not been raised with Complainant previously. In short, this sequence supports a finding that Peterson ultimately employed the panel procedure incident to punish complainant as the CAQR controversy intensified.

Respondent articulated a variety of reasons in justification of the disciplinary letter and MAS which the ALJ found to be pretextual. R.D. and O. at 47-49 (subparts (3) and (4)). I agree with and adopt this finding. In its support, I rely particularly on evidence summarized at pages 33-34 of the R.D. and O. under the headings "Problem Solving" and "Clamps/CCTS"

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and at pages 14-15, specifically the final paragraph on page 14 which continues onto page 15 and the remaining paragraph on that page.[7]

I also rely on the evidence summarized at pages 20-22 of the R.D. and O. in two separate respects. First, in finding unlawful discrimination, the ALJ implicitly discredited management testimony concerning motivation. The evidence at pages 20-22, which details misrepresentations made by Managers Peterson and Johnson to OIG Special Agent Jones in the course of her investigation, supports the ALJ's credibility determination. Second, Respondent's newly-instituted "forced distribution" policy, that two percent of management would be rated "unsatisfactory," applied overall to TVA's entire nuclear power organization. This fact renders unlikely the precise bell curve configuration contained in Exhibit C-81, which involves only Johnson's quality assurance division at the Watts Bar Plant. Thus, lowering Complainant's numerical score enabled Peterson to seize upon an improper application of Respondent's policy in rationalizing the unsatisfactory rating. *See* R.D. a d O. at 37-38 ("Forced Distribution").

Evidence summarized on page 35 of the R.D. and O., that Complainant's MAS was inconsistent with ratings of others not engaging in protected activity, similarly supports a finding of pretext. Finally, I am persuaded by evidence summarized at pages 36-37 under the headings "Management Appraisal System" and "Get Well Plan" that Respondent deviated from its routine procedures in evaluating Complainant's performance. These deviations suggest that Respondent manipulated its system to punish Complainant and seized upon incidents not deserving of discipline as the rationale for retaliation.

Respondent also defends that it terminated Complainant as part of its reorganization and RIF. The ALJ rejected this rationale predominantly because of Respondent's successful efforts in retaining all other managers who elected to stay. R.D. and O. at 49-51 (subpart (5)) and "Nonselection" heading. See id. at 25-26 under heading "Others Got Jobs." The ALJ's rejection also finds support in the fact that Johnson directly encouraged Complainant to seek outside employment as early as February 1988. R.D. and O. at 24. Thus, well before the RIF was announced or implemented, Johnson at least hoped that Complainant would leave Respondent's employment. I adopt the ALJ's finding that

Respondent terminated Complainant in retaliation for his protected activity and that it seized upon the RIF to rationalize its unlawful action.

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2. The Remedy

In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment . . . . 42 U.S.C. § 5851(b)(2)(B). In addition, "the Secretary may order such person to provide compensatory damages to the complainant." Id. Finally, the Secretary "shall" assess costs and expenses, including attorney's and expert witness fees, reasonably incurred in the bringing of the complaint. *Id.; DeFord v. Secretary of Labor*, 700 F.2d 281, 288-289, 291 (6th Cir. 1983).

a. Timeliness

Under the ERA, a complainant must file a discrimination complaint "within 30 days after such violation occurs . . . . 42 U.S.C. § 5851(b)(1). The ALJ found that the violations occurring in 1987, i.e., the disciplinary letter and the unsatisfactory MAS, continued forward into the filing period following Complainant's RIF notification and thus could be subject to a remedial order. R.D. and O. at 43-44. Accordingly, the ALJ recommended that the back pay award, although not beginning until the date of termination, be calculated at a rate reflecting the pay increase Complainant would have received had he been evaluated as a "solid performer" in his 1987 MAS. R.D. and O. at 52. The ALJ further recommended an order upgrading Complainant's 1987 MAS and expunging all references to his prior, unsatisfactory MAS from his personnel records. *Id.* Such relief is available, however, only if Respondent's entire course of conduct from September 1987 through August 1988 can be characterized as a continuing violation.[8] Respondent argues that 1987 claims are time-barred. The question is close.

Courts generally recognize an equitable exception to statutory limitations periods for continuing violations "'[w]here the unlawful employment practice manifests itself over time, rather than as series of discrete acts.'"[9] *Waltman v. Intern. Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989), *quoting Abrams v. Baylor College of Medicine*, 805 F.2d 528, 532 (5th Cir. 1986). In order to invoke the exception, a plaintiff must show that an ongoing violation, and not just the effects of a previous

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violation, extended into the statutory period. *Bruno v. Western Elec. Co.*, 829 F.2d 957, 960 (10th Cir. 1987). *See English v. Whitfield*, 858 F.2d at 962-963 (discrete,

consummated, immediate violation is not "continuing" merely because its effects carry forward); *compare Held v. Gulf Oil Co.*, 684 F.2d 427, 430-432 (6th Cir. 1982) (where, throughout employment, plaintiff's disproportionately heavy workload never lightened, sex-based innuendos continued, and plaintiff absolutely was excluded from using the supply terminal; sex discrimination continued through date of constructive discharge).

The court in *Berry v. Bd. of Supervisors of LSU*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986), identified the following three factors as bearing on this determination:

> (1) Subject matter. Do the acts "involve the same type of discrimination, tending to connect them in a continuing violation?"

Berry at 981. *See Graham v. Adams*, 640 F. Supp. 535, 538-539 (D.D.C. 1986) (continuing violation allegations must connect remote claims to incidents addressed by claims timely filed).

> (2) Frequency. Are the acts "recurring . . . or more in the nature of an isolated work assignment or employment decision?"

Berry at 981. Under this factor, a complainant can establish a continuing violation either through a series of discriminatory acts against an individual or a respondent's policy of discrimination against a group of individuals. *Green v. Los Angeles Cty. Superintendent of Sch.*, 883 F.2d 1472, 1480-1481 (9th Cir. 1989); *Bruno v. Western Elec. Co.*, 829 F.2d at 961. The distinction is between "'sporadic outbreaks of discrimination and a dogged pattern.'" *Id.*,[10] *quoting Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 725 n.73 (D.C. Cir. 1978).

> (3) Degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Berry at 981. In considering this factor, the court in Waltman *v. Intern. Paper Co*., reasoned:

> Acts of harassment that create an offensive or hostile

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> environment generally do not have the same degree of permanence as, for example, the loss of a promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated.

875 F.2d at 476.[11]

With regard to the subject matter, the acts -- job criticism, a withheld pay increase, blacklisting, and termination -- consistently affected Complainant's compensation, terms, conditions, and privileges of employment and thus comprised the same type of discrimination. While these progressively more serious personnel actions were varied, the motivation behind them was the same -- retaliation for protected activities related to quality and safety. With regard to frequency, the acts recurred throughout the 12-month period in issue. The job criticism commenced in September 1987 with the disciplinary letter and culminated in the MAS which finally was signed in November. The blacklisting became increasingly apparent as Complainant sought to transfer positions in early 1988 and as other managers were placed in remaining positions during the summer and fall of 1988. Accordingly, the first and second *Berry* factors are met.

The "degree of permanence" factor presents difficulty, however. On the one hand, I agree with the ALJ that the acts represented a continuing campaign of harassment intended to "run [Complainant] off." On the other hand, the unsatisfactory MAS, which effectively denied Complainant a percentage pay increase, was sufficiently permanent to trigger his awareness of Respondent's discriminatory motivation. In fact, Complainant complained to TVA Board Chairman Dean and ultimately reported the MAS to the NRC. R.D. and O. at 22. I find that because Complainant should have been aware of his rights upon receipt and signature of the MAS in November 1987, this violation and the earlier harassment occasioned by the disciplinary letter do not carry forward into the 30-day period following Complainant's RIF notification in July 1988. As a result, the 1987 claims are untimely and cannot be a basis for relief. I note, however, that evidence of discriminatory actions antedating the filing period but found not to be "continuing" violations nevertheless may

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constitute relevant background evidence, i.e., "[e]vidence of past practices may illuminate . . . present patterns of behavior." *Malhotra v. Cotter & Co.*, 885 F.2d at 1310. Accordingly, the earlier violations properly bear on questions of Respondent's later motivation, even if the associated claims are untimely. I find further that Respondent's blacklisting of Complainant during 1988, which prevented his transfer and retention in another capacity, was not sufficiently apparent to trigger Complainant's awareness until his actual RIF notification. Accordingly, these violations continued forward into the filing period, rendering the blacklisting claims timely.

b. Compensatory Damages

Complainant claims compensable damage to his health resulting from Respondent's actions. The ALJ found the proffered evidence too limited to permit an award. I disagree.

In awarding such damages in *Johnson, et al. v. Old Dominion Security*, Case Nos. 86-CAA-3, *et seq*., Sec. Dec., May 29, 1991, slip op. at 25-28, I relied primarily on *DeFord v. Secretary of Labor*, 700 F.2d at 283; *DeFord v. Tennessee Valley Authority* Case No. 81-ERA-1, Sec. Remand Dec., Apr. 30, 1984, slip op. at 2-3; and *Aumiller v. Univ. of Del.*, 434 F. Supp. 1273, 1309-1311 (D. Del. 1977). In *DeFord* and *Aumiller*, each individual received a damages award of $10,000 in compensation for distress suffered as the result of unlawful employment discrimination.[12] In upholding a $40,000 compensatory award in Fleming v. County of Kane, State of Ill., 898 F.2d 553, 561-562 (7th Cir. 1990), the court discussed the supporting evidence:

> The record in this case does show a rational connection between the evidence and the damage award. . . . [It includes] evidence describing Fleming's humiliation at being subjected to defendants' adopted course of 'progressive discipline.' . . . Fleming testified to his embarrassment and humiliation at being reprimanded in front of his fellow employees, some of whom he had worked with for many years. . . . [H]e testified to certain depression he suffered during the period in question, as well as to serious headaches and sleeplessness . . . . [T]his testimony as to his physical and emotional condition was supported by testimony from his wife and a fellow department employee. The testimony of . . . Fleming's personal physician indicates that the job stress which Fleming experienced . . . may have resulted in an aggravation of his physical condition.

Id. at 562. *See Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989) (award should have been no greater than $50,000 where plaintiff testified "that his job loss was 'very stressful' [and] that he was angry, depressed, scared and frustrated" and his wife testified "that he was under 'tremendous emotional strain' and that they experienced significant financial difficulties")*; Webb v. City of Chester, Ill*., 813 F.2d 824, 836-837 and nn.3,4 (7th Cir. 1987) (citing cases) (in upholding award of $20,000 for embarrassment and humiliation, court noted that a review of discharge cases brought for violation of rights showed awards for embarrassment, humiliation, and mental distress ranging up to $50,000); *Muldrew v. Anheuser-Busch Inc*., 728 F.2d 989, 992 and n.1 (8th Cir. 1984) (holding "reasonable" an award of $50,000 for emotional distress and mental suffering based on evidence that "as a result of his discharge [plaintiff] lost his car and house, he and his wife began experiencing marital problems, and he felt that his children respected him less"); *Block v. R.H. Macy & Co*., 712 F.2d 1241, 1245 (8th Cir. 1983) (award of $12,000 held reasonable where plaintiff was berated loudly and publicly by management, was terminated on false grounds, was unable to obtain other employment for substantial period, was forced to borrow money to support family, and suffered sleeplessness, anxiety, embarrassment and depression); *Ruhlman v. Hankinson*, 461 F. Supp. 145, 151 (W.D. Pa. 1978), *aff'd*, 605 F.2d 1195, 1197 (3d Cir. 1979) (table), *cert. denied*, 445 U.S. 911 (1980) (evidence of emotional distress amounting to more than "some pressure and embarrassment" sufficient to sustain award of $50,000)*. Cf. Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) (upholding award based on evidence of inability to secure alternate employment and testimony by plaintiff and others regarding plaintiff's

deterioration in health, mental anxiety, humiliation and emotional distress caused by discriminatory working conditions and discharge).

In the instant case, in addition to losing his livelihood, Complainant forfeited his life insurance and health and dental insurance upon termination. He was unable to find other employment. Complainant testified that his blacklisting and termination exacerbated pre-existing hypertension and caused frequent stomach problems, necessitating treatment, medication, and emergency room admission on at least one occasion.[13] He experienced problems sleeping at night, exhaustion, depression,

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and anxiety. He felt remorse that the education of his daughters and the career of his wife were disrupted. T. 4/24/89 at 156- 166. Raised in rural Tennessee in an area subject to frequent flooding and without access to electricity, Complainant felt dismay that his 15 years of "trying to do a job that [he] thought was a good job" for TVA and "the people of this Valley" had been "wiped out by these people, Lenny Peterson and Hoyt Johnson." T. 4/24/89 at 166. Complainant's wife described his behavior:

> [H]e had always been a kind and loving husband, and we had always been able to settle all of our . . . disagreements . . . . [H]e became increasingly withdrawn and he didn't talk to me a lot. [H]e would get upset over trivial matters and would withdraw to the den . . . . I could not get responses out of him or try to work things out . . . . He would get up in the middle of the night and watch TV because he said he couldn't sleep. . . . He became obsessive about his blood pressure. He had a blood pressure kit and held come in from work and sit there with that blood pressure kit taking his blood pressure 15 times a night, and it drove me bananas to hear that beep, beep, beep all evening.

T. 4/27/89 at 11-12. Complainant's distress, manifested by his physical symptoms, appears sufficiently similar to that shown in the *DeFord* and Aumiller cases to support an award of $10,000.[14] *See* n.12, *supra.*

c. Front Pay

Complainant seeks an award of front pay in the event that reinstatement is found to be inappropriate. Complainant bases his request on apprehensions of continued harassment or a subsequent RIF. T. 4/24/89 at 166.

Reestablishment of the employment relationship is a usual component of the remedy in discrimination cases. Reinstatement is not always feasible, however, because of irreparable damage to the employment relationship engendered by employer animosity. *See Blum v. Witco Chemical Corp.*, 829 F.2d 367, 373-374 (3d Cir. 1987); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728-729 (2d Cir. 1984).

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Assuming, without deciding, that Section 210 of the ERA authorizes an award of front pay in appropriate cases, I am not persuaded on the instant record that "a productive and amicable working relationship would be impossible," *EEOC v. Prudential Federal Sav. and Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985), or that "[r]etaliation would [be] the order of the day," *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980), were Complainant to return to work. *Compare Spulak v. K Mart Corp.*, 894 F.2d 1150, 1157-1158 (10th Cir. 1990) (front pay award upheld where company investigation left plaintiff supervisor's employees with impression that he was guilty of wrongdoing and company previously had threatened to "find some other way to fire him" if he decided to withdraw his "resignation" and remain); Goss *v. Exxon Office Systems Co.*, 747 F.2d 885, 888-890 (3d Cir. 1984) (reinstatement of plaintiff to job necessitating positive mental attitude inappropriate where company had shattered plaintiff's confidence completely). Thus, I decline to award front pay.

ORDER

Respondent TVA is ordered to:

1. Offer Complainant, Frederick E. McCuistion, reinstatement to a position commensurate with his experience, expertise, compensation and position that he held at the time of his termination of employment on August 25, 1988.

2. Compensate Complainant for back pay from his August 25, 1988, termination through the date of reinstatement. The value of severance pay received by Complainant, R.D. and O. at 40, should be offset against the back pay award.

3. Pay prejudgment interest on the back pay amount to be computed in accordance with the rate invoked under 29 C.F.R. § 20.58(a) (1990). *See Johnson et al. v. Old Dominion Security*, Case Nos. 86-CAA-3, et seq., Sec. Dec., May 29, 1991, slip op. at 24, 32; *Wells v. Kansas Gas & Electric Co.*, Case No. 85-ERA-22, Sec. Dec., Mar. 21, 1990, slip op. at 17 and n.6*, appeal dismissed*, No. 91-9526 (10th Cir. Aug. 23, 1991).

4. Restore to Complainant all benefits, terms and conditions of employment in effect on August 25, 1988.

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5. Pay Complainant damages in the amount of $10,000 in compensation for distress suffered as the result of his blacklisting and termination.

6. Compensate Complainant for life, health, and dental insurance premium payments made by Complainant after having lost these benefits as the result of his termination.

7. Compensate Complainant for expenses of ,004.25 incurred in searching for alternate employment.

8. Cease and desist from any discrimination against Complainant including any acts inclined to blacklist him from employment.

9. Pay to Complainant's counsel, Carol S. Nickle, and her legal assistant, Cheryl S. Mahaffy, fees in the total amount of $51,665.29 as set forth in the ALJ's April 12, 1990, Recommended Order on Statement of Legal Services and Fees.

Counsel for Complainant is permitted a period of 20 days in which to submit any petition for fees and expenses incurred in review of the ALJ's R.D. and O. before the Secretary. Respondent thereafter may respond to any petition within 20 days of its receipt.

SO ORDERED.

Lynn Martin
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]Here, Complainant contends that Respondent's motives were wholly retaliatory, and Respondent counters that its motives were wholly legitimate. Thus, neither party relies on a "dual motive" theory in advancing its case. In this circumstance, use of the "pretext" legal discrimination model appears appropriate because it focuses on determining the employer's true motivation, rather than weighing competing motivations. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Accordingly, I do not employ the "dual motive" standard mentioned by the ALJ. R.D. and O. at 51.

[2]These officials included Admiral Stephen White and TVA Board Chairman Charles "Chili" Dean. R.D. and O. at 5.

[3]Complainant reported to Roy Anderson, who in turn reported to Leonard Peterson, who reported to Hoyt Johnson, the most senior quality assurance manager at the Watts Bar Nuclear Plant.

[4]The CAQR which arose out of the September 2, 1987, inspection was not issued until early January 1988, due to ongoing disagreement between Complainant and his inspectors, and the manager of the quality engineering section. R.D. and O. at 7-10. The "untimeliness caused by the resistance of management to . . . issuing [this] CAQR" precipitated a second CAQR. R.D. and O. at 43.

[5]Complainant's prima facie case requires a showing sufficient to support an inference of unlawful discrimination. This burden is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253. Direct evidence is not required for a finding of causation. The presence or absence of retaliatory motive is provable by circumstantial evidence, even in the event that witnesses testify that they did not perceive such a motive. *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981). *Accord Mackowiak v. University Nuclear Systems Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

[6]*See* R.D. and O. at 7. The CAQR debate extended throughout the month of September. on either September 24 or 29, Inspector Willoughby presented Peterson with a CAQR that he had prepared, Peterson refused signature, and Willoughby reported the impasse to the ECP. Hearing Transcript (T.) 4/25/89 at 91-95.

[7]In rationalizing its personnel actions, Respondent invoked the following incidents: (1) one of Complainant's inspectors had consulted Mr. Peterson, instead of Complainant, about a promotion; (2) Complainant had requested excessive extensions in completing a project; and (3) Complainant had implemented a deficient procedure. The ALJ found essentially that Complainant's inspector properly consulted Mr. Peterson, that any blame associated with the project's completion clearly fell on another supervisor, and that the procedure deficiency did not merit discipline, even in the unlikely event that Complainant was responsible.

[8]"Once having shown discrimination continuing into the actionable period . . . plaintiffs may also recover for portions of illegal discrimination that antedated the limitations period." *McKenzie v. Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982). *See Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir. 1989).

[9]The court in *Malhotra v. Cotter & Co.*, 885 F.2d at 1310, explained:

> What justifies treating a series of separate violations as a single continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment.

[10]In *Bruno*, the court focused on the defendant's intent "to take any action necessary to get rid of plaintiff" in affirming the district court's finding of a continuing violation. 829 F.2d at 961-962.

[11]A compelling case might be made for the presence of a continuing violation, however, where a respondent engages in a systematic practice of denying promotion opportunities and other benefits. *See Tyson v. Sun Refining & Marketing Co.*, 599 F. Supp. 136, 138-140 (E.D. Pa. 1984), and cases discussed therein.

[12]As the result of the embarrassment and humiliation accompanying his demotion, DeFord developed chest pains and tightness, difficulty in swallowing, nausea, indigestion, and difficulty in sleeping. Stress, anxiety, and depression were held to constitute mental conditions of which his physical symptoms were specific evidence. The nonrenewal of Aumiller's teaching contract caused anxiety neurosis. Symptoms included insomnia, nightmares, fatigue, feelings of being overwhelmed, appetite loss, and pressured speech. Aumiller experienced severe financial difficulties, forcing him to lower his standard of living. A clinical psychologist provided testimony documenting his condition and establishing causation. Individuals who worked with Aumiller testified to observing deterioration in his mental attitude.

[13]On the date of his RIF, Complainant's blood pressure registered in the vicinity of 226/116. T. 4/24/89 at 162. "[T]he doctor told him to go home and get out from under the stress." R.D. and O. at 40. *See* Exhs. C-62, C-63 (medical documentation of symptoms, including blood pressure, stomach problems, anxiety).

[14]In *Fleming v. County of Kane, State of Ill.*, 898 F.2d at 561, the court determined that an examination of "compatibility among such awards, i.e., whether the award is out of line with awards in similar cases," generally is in order.